

## "ENOUGH, AND AS GOOD" OF WHAT?

Carol M. Rose\*

God gave [the World] to the use of the Industrious and Rational, . . . not to the Fancy or Covetousness of the Quarrelsom and Contentious.\*\*

John Stick's article<sup>1</sup> does a double reverse loop-the-loop on John Rawls<sup>2</sup> and Robert Nozick,<sup>3</sup> purporting to show that each really thinks the same way as the other on a range of important theoretical subjects. It is a fascinating piece for three reasons, quite aside from its extraordinary imaginativeness: (1) it has as much to say about John Locke as about Rawls and Nozick; (2) it is in part utterly sensible and correct; and (3) in the remainder, it is stubbornly perverse.

Point (3) comes to bear in large part in the article's second half, where Stick attempts to turn Nozick into Rawls. He makes the surprising argument that even under a Nozickean (or neo-Lockean) conception of entitlements, we should arrive at Rawls' more-or-less redistributive "difference principle." This *tour de force* is, I believe, Stick's main object in writing the article. Indeed, one might think that this part of the paper is but a thin cover for what looks like Stick's own ruminations on property, and most particularly on the debt supposedly owed by Lockean appropriators (the "haves") to the nonappropriators (the "have nots").

I will thus concentrate on the second half of the paper, but I am going to begin with a character that shows up as a critic of the first half. Who is the critic? Why, who else but the Rational Utility Maximizer, or as I shall call her, RUM. RUM thinks, to put it briefly, that Stick is not thinking enough about the total goodies that will be available to our society, or about the incentives we need to get that total to its maximum.

### I. RUM CONTEMPLATES THE PIE

RUM has a few things to say about Part II, which sets out the first of Stick's two reversals. Stick argues that, contrary to Nozick's own

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\* Professor of Law, Northwestern University. A.B., Antioch College (1962); M.A., University of Chicago (1963); Ph.D., Cornell University (1969); J.D., University of Chicago (1977). The author thanks John Donohue, Victor Goldberg, Tom Merrill, Geoff Miller, Marty Redish, and David Van Zandt for their very helpful comments.

\*\* J. LOCKE, *Second Treatise*, in TWO TREATISES OF GOVERNMENT § 34, at 333 (P. Laslett ed. 1960).

<sup>1</sup> Stick, *Turning Rawls into Nozick and Back Again*, 81 NW. U.L. REV. 363 (1987).

<sup>2</sup> J. RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>3</sup> R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

complaints about Rawls,<sup>4</sup> Nozick really could have fit his views of a just society into the Rawlsian framework of discussion. Nozick, to be brief, thinks that property and entitlement are parts of any just society, that nobody should be deprived of entitlements that have been justly acquired to begin with and justly (that is, voluntarily) transferred thereafter;<sup>5</sup> he thinks that these entitlements should not be subjected to Rawls' "difference principle" of wealth distribution, whereby inequalities would be eschewed except insofar as they improve the state of the least-well-off person.<sup>6</sup>

Stick quite ably shows that Rawls' analytical framework does not preclude any consideration of Nozick's points, and he illustrates the various sockets in Rawls' argumentative structure into which Nozick might plug his nonredistributable entitlements. I will not repeat Stick's demonstrations, which on the whole seem to me fair—as does his suggestion that Nozick's arguments for entitlements probably wouldn't get very far in a Rawlsian universe.

But our critic RUM has some trouble with both Rawls' and Nozick's theories. RUM is someone who wants lots of everything. Consider RUM behind Rawls' "veil of ignorance,"<sup>7</sup> where she has to choose a social system without knowing where she will be in that system, or even what things she will value.<sup>8</sup> What system will she choose? Clearly, she will want a system in which there is a lot of everything, so that she gets a shot at the most of whatever it is that she turns out to want. Her objective in choosing a system of social ordering, then, is to choose the system in which the total pie is apt to be largest.

Note that RUM is not a nasty person; she may be thinking of the well-being of her neighbors as well as herself when she concludes that all are better off with social institutions that encourage the biggest possible pie.<sup>9</sup> Moreover, she is not a philistine. She calculates that a wealthier society will be better able to afford books, art, music, universities, and all the things that support the life of the mind; the "more" that she wants has more of those things too. On the whole, she and those like her are not afraid of risks, because taking all the RUMs together, those who would rather have a big chance at a small amount balance out those who would rather have a small chance at a big amount.<sup>10</sup> What she really

<sup>4</sup> *Id.* at 207 (Rawls' theory is incompatible with Nozick's "historical-entitlement conceptions of justice").

<sup>5</sup> *Id.* at 150-53.

<sup>6</sup> *Id.* at 195-96, 201-03 (critique); J. RAWLS, *supra* note 2, at 75, 76 (difference principle).

<sup>7</sup> J. RAWLS, *supra* note 2, at 137.

<sup>8</sup> *Id.* at 142 (person behind veil of ignorance does not know what own social station will be, or even own concept of good).

<sup>9</sup> She may even be more interpersonally directed than Rawls would suppose. See *id.* at 11, 127 (people behind veil of ignorance are mutually disinterested); cf. *id.* at 128 (same people have some intergenerational concerns).

<sup>10</sup> RUM doesn't quite know what to make of Rawls' attitude toward risk. He says that those

thinks is that all of them are going to have a better chance of being better off—whatever their individual conceptions of the "good life"—if the pie is bigger rather than smaller.

And how will the total pie be at its largest, so that RUM (and her neighbors) have a chance to share the greatest amount? Well, Rawls would say that it is all right for RUM to know about economics behind the "veil of ignorance," even if she doesn't know her particular station.<sup>11</sup> So RUM pays attention to property theorists, who have been telling us for years (Locke perhaps first, but Bentham most clearly of all<sup>12</sup>) that the pie will be at its largest if there is a system of private property.

The reason for this, they say, is because private property gives property owners the rewards of their labor on what is "theirs," and thus a property regime encourages them to take care of their property—to invest their time, effort, and talents on it—or to sell the property to someone who can make even better use of it.<sup>13</sup> When all this investment and buying and selling reaches equilibrium, every resource winds up in the hands of those who value it most, and get the most out of their care and investment in it. That is to say, the end result of a private property system is just what RUM wants: the biggest possible pie.

Fancy theories of redistribution don't appeal to RUM. She doesn't really care who "deserves" what;<sup>14</sup> she is interested in results. By failing to allow entitlement holders to capture the value that derives from their investment, redistributive theories might discourage property owners from investing their precious time and talents in the first place, and thus,

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behind the veil should have no special aversion to risk, *id.* at 137, yet his description of behind-the-veil choices sounds distinctly risk-averse. See, e.g., *id.* at 156 (choosers want "satisfactory minimum" and may have "little reason for trying to do better"); *id.* at 157-58 (chooser appears to prefer more certain chance at small amount over less certain chance at larger amount). RUM notes that Rawls puts considerable stress on the maximin principle in describing the choices that would be made behind the veil in favor of the difference principle. See, e.g., *id.* at 150-58. That view has been described as "conservative," see, e.g., A. CHIANG, FUNDAMENTAL METHODS OF MATHEMATICAL ECONOMICS 747-49 (2d ed. 1974); Scanlon, *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1049 (1973)—perhaps unrealistically so, see A. CHIANG, *supra*, at 749; Nagel, *Rawls on Justice*, in READING RAWLS 1, 10-13 (N. Daniels ed. 1975). In any event, even if maximin applies to zero-sum or constant-sum games, see A. CHIANG, *supra*, at 743, RUM thinks that if different institutions create different incentives to productivity, then the size of the pie can vary with social institutions, and hence the choice is not a constant-sum game at all but a positive-sum game, where the applicability of maximin is doubtful. She notes that in one very commonly described positive-sum game, the "prisoners' dilemma," the maximin principle would lead both "players" to defect contrary to their collective welfare. For the prisoners' dilemma and its relation to a property regime, see *infra* note 80 and accompanying text.

<sup>11</sup> J. RAWLS, *supra* note 2, at 137, 142.

<sup>12</sup> J. BENTHAM, *Principles of the Civil Code*, in THEORY OF LEGISLATION 67-77 (R. Hildreth trans. 1975).

<sup>13</sup> *Id.* at 67-69.

<sup>14</sup> Cf. J. RAWLS, *supra* note 2, at 103-04 (because of natural endowments, no one deserves anything since no one deserves natural endowments).

redistributive theories run the risk of making the total pie smaller.<sup>15</sup> To repeat, what she wants is a chance at the biggest pie, because that is where she calculates her chances are greatest for getting what she really wants, to wit, *more*. Thus she won't like Rawls' "difference principle" if it entails redistribution (or even if it just disheartens the enterprising types from making more),<sup>16</sup> because she is afraid that when the dust settles after the big moneymakers have to split some of the gains with the losers, the biggies will suffer Benthamite discouragement, and will loaf around under the breadfruit trees instead of working hard and increasing the total wealth pie.<sup>17</sup>

So far, then, it seems that RUM would side with Nozick against Rawls, or at least against Rawls' "difference principle." But is Rawls' "difference principle" necessarily a redistribution scheme? Putting aside Rawls' own objections momentarily, a weak version of the principle might exist, which would mean that rich people could get richer, so long as poor people didn't get poorer. This would seem to be "to everyone's

<sup>15</sup> Bentham still has the most graphic description of the "evils which result from attacks upon property," including "evils of non-possession," "pain of losing," "fear of losing," and "deadening of industry." J. BENTHAM, *supra* note 12, at 70-73. Frank Michelman has borrowed the latter three for his now-famous category, "demoralization costs." See Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 HARV. L. REV. 1165, 1211-14 (1967).

RUM is aware that, if one assumes declining marginal utility of income (or wealth), there might be some utility gains from redistribution from the better-off to the worse-off, see Scanlon, *supra* note 10, at 1053-55, and that at some levels of redistribution, these gains might offset the loss in material wealth that occurs because of the disincentives to produce more. See Michelman, *Constitutional Welfare Rights and A Theory of Justice*, in READING RAWLS, *supra* note 10, at 319, 324-25. She is somewhat skeptical, however, particularly about Rawls' version, because (1) she notes that Rawls' "difference principle" would try to increase the worst-off share whether or not total net "utility" increases, *see id.* at 327, and (2) she is not so certain that the marginal utility of income really does decline, *see* W. BLUM & H. KALVEN, THE UNEASY CASE FOR PROGRESSIVE TAXATION 56-62 (1953) (critique of arguments for declining marginal utility of income).

<sup>16</sup> See J. RAWLS, *supra* note 2, at 81 (difference principle excludes greater average wealth where fortunes of least well-off would decline). RUM notes that in at least some instances like this, the best-off could improve their situation and then pay the worst-off to make up for the decline that the worst-off otherwise would suffer. She thinks that this is entirely appropriate, because she doesn't think there is any real gain when someone is made better off at someone else's expense. She doesn't think, however, that the best-off's payments should have to make the people that were worst-off better off than they were before. She thinks that such a requirement would siphon off the gains to enterprise, and would discourage industry. In any event, RUM thinks that the encouragement of industry does in fact diffuse benefits throughout a society, because everyone's labor becomes more valuable. *See infra* notes 48-49, 52-53 and accompanying text.

<sup>17</sup> J. BENTHAM, *supra* note 12, at 71 ("When I despair of making myself sure of the produce of my labour, I only seek to exist from day to day."). Rawls notes that a limitation on his discussion is that everyone is presumed to follow rules that are established in conformity to principles of justice; presumably everyone would follow any redistributive scheme that was agreed upon according to just principles, even though everyone is presumed to be self-interested. J. RAWLS, *supra* note 2, at 8, 145. RUM doesn't think this way; she thinks there is no point in figuring out an ideal set of rules without taking into account the incentives and disincentives that the rules themselves might create in self-interested individuals.

advantage"<sup>18</sup>—or at least to no one's disadvantage—and would be roughly equivalent to what the economists talk about with some word that begins with "Pareto-." We arrive at "Pareto-optimality" when no further transfer can be made to make someone better off, without making someone else worse off.

The trouble with this reading is that Rawls explicitly states that the difference principle goes a step beyond Pareto-optimality, which Rawls rejects.<sup>19</sup> But in some spots, Rawls does sound awfully close to Pareto.<sup>20</sup> If we could speculate that this was all that some Pseudo-Rawls had in mind—no wealth-increasing transfers to some if the transfers make other people worse off—then Pseudo-Rawls and Nozick would not really differ. Nozick too would prohibit anyone from becoming better off at someone else's expense, and if we take the view that each person is the best judge of what is an expense to her, then the Pseudo-Rawlsian/Pareto scheme would collapse into Nozick's protection against nonconsensual transfers of entitlements.<sup>21</sup> On this reading, Stick would be right. The distinction between the two would collapse, though not in the way Stick is talking about. Moreover, RUM should be satisfied since such a theory protects entitlements against nonconsensual transfers and encourages the useful labor, investment, and trade that brings forth the most bounteous pie.

But hold everything: Nozick (along with Pareto) doesn't seem to want any nonconsensual transfers at all, except to rectify past injustices.<sup>22</sup> RUM has read Richard Epstein, and she knows that if the pie is really going to be at its biggest, then there have to be some "utilitarian constraints" on a regime of pure voluntarily transferred entitlements.<sup>23</sup> She is smart enough to see that there may be problems that mess up markets and impede the voluntary transfer of resources to those who want them most. For example, sometimes there are just too many potential buyers and/or sellers to organize a market, or some of those buyers and sellers act strategically, or some resources are easily monopolized (or can become so by cartelization).<sup>24</sup> Under such circumstances, entitlements subject only to voluntary transfer are not going to bring the largest possible pie, and RUM would prefer to allow for some involuntary transfers, when necessary to overcome market impediments to getting goodies

<sup>18</sup> See J. RAWLS, *supra* note 2, at 60.

<sup>19</sup> *Id.* at 69-71.

<sup>20</sup> See, e.g., *id.* at 157 (disparities in wealth and income are acceptable if they raise fortunes of least-well-off "in the slightest degree").

<sup>21</sup> R. NOZICK, *supra* note 3, at 172 (arguing against nonconsensual transfers).

<sup>22</sup> *Id.* at 152-53, 230-31; *see id.* at 93-95 (comments on public goods); *id.* at 169-71 (comments on taxation).

<sup>23</sup> R. EPSTEIN, TAKINGS 337-38 (1985) (criticizing Nozick's unbending view of entitlements); Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

<sup>24</sup> See R. EPSTEIN, *supra* note 23, at 5, 167-69.

into their most highly valued use.<sup>25</sup>

But RUM's willingness to accept some involuntary transfers doesn't mean that she wants the "difference principle," if that is understood to mean redistribution, because that principle would not transfer things to those who value them most, but only to those who just don't happen to have very much. She may be very sympathetic to those who don't have much, but she is afraid that if we take away gains from those who invest and trade, they just won't bother, or at least they won't bother as much, and the pie will be smaller.<sup>26</sup> She also is not stuck, like Nozick, on entitlements as such; she knows perfectly well that it begs the entitlement question to talk about "redistribution,"<sup>27</sup> since the entitlement itself could be set up with an element that required giving a cut to the poor. But she wants an entitlement system that doesn't necessitate any such cut, because she wants the greatest return to go to those whose efforts increase the pie, so that they will be encouraged to go ahead; she even thinks that this ultimately is going to make things better for the "have-nots" too.<sup>28</sup>

So RUM's view about the first half of Stick's article is that both Rawls and Nozick have it wrong. She wants a shot at the biggest pie, and that means no Rawlsian "difference principle" that redistributes wealth and disrupts the wealth-producers in their useful activities. She doesn't set her faith entirely on Nozick's voluntarily transferred entitlements, though, because under some circumstances those too may lessen the size of the pie—even though, on the whole, they serve to increase the pie. Once again, note that RUM need not be hardhearted, or unthinking about her neighbors; after all, once the veil gets lifted, she too may be one of the disadvantaged. She just thinks that everybody has a greater chance to be better off if the pie is at its biggest.

<sup>25</sup> See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-10 (1972) (liability rules sometimes substituted for property entitlements). RUM does have a caveat here, of course: the institutions for transfer must work cheaply and efficiently—or at least they should cost less than the market impediments—or else she would rather have the unfettered market, warts and all. She is also worried that involuntary transfer may be abused and may turn into a "rent-seeking" scenario in which unproductive competition for political favors fritters away more productive efforts in ordinary market exchanges. See Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 3, 7-11 (J. Buchanan, R. Tolleson & G. Tullock eds. 1980).

<sup>26</sup> As Bentham put it, "[I]f property should be overturned with the direct intention of establishing an equality of possessions, the evil would be irreparable. No more security, no more industry, no more abundance! Society would return to the savage state whence it emerged." J. BENTHAM, *supra* note 12, at 73.

<sup>27</sup> See Stick, *supra* note 1, at 380 n.94 (redistribution begs question).

<sup>28</sup> See *infra* notes 48-49, 52-53 and accompanying text.

## II. APPROPRIATION AND THE COMPENSATION ISSUE, AND HOW THE PIE CAN BE BIGGER THAN PLENTITUDE

That brings me to the second half of Stick's article, where RUM has some other comments—in fact, quite a lot of them. After Stick argues that Nozick can put his argument into a Rawlsian framework, he turns the tables. In this half, Stick argues that Rawls' difference principle—according to which inequalities in wealth can occur only if the least-well-off are made better off—is compatible with Nozick's entitlement theory. He derives this view, in large part, from Nozick's acceptance of Locke's famous "Proviso": appropriators from the commons of nature are supposed to leave "enough, and as good" for others. This means, Stick argues, that in a world where resources are already fully taken, those who have property must compensate those who come later and who don't have "enough, and as good" to appropriate.<sup>29</sup>

As I mentioned, the second half of the article seems to me in large measure a vehicle for Stick to explain why wealth should go from the well-off to the less-well-off. Well, I don't know about Nozick, but I have a pretty good idea that RUM isn't going to like it. RUM won't like it because, as explained above, she is afraid that this version of the "difference principle" is going to leave the total pie pretty small, or at least a good deal smaller than would a property regime that (except under quite special circumstances) lets people keep all the rewards of their investments of time and effort. And if the pie is smaller, then her chances at a bigger slice are diminished.

Moreover, I have a pretty good idea that old John Locke wouldn't like it either. Locke lurks in the background of a good deal of this discussion, but Locke looks to me as if he had a lot of RUM in him.<sup>30</sup>

<sup>29</sup> Stick, *supra* note 1, at 390.

<sup>30</sup> But see J. TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 147-48, 152-54 (1980). In contrast to writers like C.B. MacPherson, who would see Locke as a capitalist, Tully portrays Locke as a traditional moralist who eschewed acquisitiveness and viewed a money economy as a source of disruption. See *id.*, cf. J. MOORE, *A Comment on Pocock*, in *THEORIES OF PROPERTY, ARISTOTLE TO THE PRESENT* 167, 174 (1979) (Locke's student, the Earl of Shaftesbury, understood Locke as propounding selfish theory of ethics).

Interpretation of Locke's view of acquisition depends in part on one's understanding of Locke's attitude about his own writing. Tully takes Locke's belittling references to gold and his pious remarks against avarice at face value. See J. TULLY, *supra*. But Tully's book is part of an ongoing controversy; some, notably Leo Strauss and his students, have argued that Locke's pieties did not necessarily reflect his true views but instead were designed to ward off political or religious antagonism. See L. STRAUSS, *NATURAL RIGHT AND HISTORY* 206-07 (1953). It should be noted that Locke and his chief patron were involved in the dangerous political and religious controversies of their day and that this may have been the reason why Locke was such a cautious writer, going so far as to refuse to acknowledge his authorship of the *Treatises*. See Laslett, *Introduction to J. LOCKE, TWO TREATISES OF GOVERNMENT* 15-17, 35-36, 43-45 (P. Laslett ed. 1960).

Taking that caution into account, one might wonder just what Locke thought, for example, of "title" based on another's charity, when he said that "*Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extreme want, where he has no means to subsist

The basic problem under discussion in the second half is this: A property regime seems to wind up with the earth and its resources belonging to some people and not to others, or at least some people have more of the earth's resources than others. How could the denizens of the earth have let this happen, if, as Locke said, it all belonged to everybody at the outset?<sup>31</sup> More pointed for our own generation is the following question: Even if our ancestors gave away the earth's resources in unequal shares among themselves, how could their acts take away the share that is supposed to belong to us?<sup>32</sup> After all, as Locke said, no one was supposed to take anything out of the commons unless there was "enough, and as good" left over for everybody else, presumably including future generations.<sup>33</sup> So how do we get around the problem that some people's appropriation does not seem to leave "enough, and as good" to latecomers to the appropriation game?

One answer, which Stick takes from Nozick, is that nonappropriators can be compensated.<sup>34</sup> Indeed, Stick apparently wants to compensate them a bundle, based on a complex calculation of how far they deviate from the "baseline"—that is, the amount that they lose by

otherwise." J. LOCKE, *First Treatise*, in TWO TREATISES OF GOVERNMENT, *supra*, § 42, at 206. One would have to note that charity plays no part in Locke's theory of property acquisition in the *Second Treatise*, where it is stated at various points that labor establishes "title." See, e.g., J. LOCKE, *Second Treatise*, in TWO TREATISES OF GOVERNMENT, *supra*, § 32, at 332 [hereinafter *Second Treatise*]; *id.* § 51, at 344. Though one might think that labor-based "title" applies only to acquisition in a state of plenty, Locke is silent on any title based on charity, even after the universal agreement to use money has ushered in scarcity. *See id.* §§ 48-50, at 343-44. This is not to join those who argue that Locke approved of avarice and a money economy, but only to suggest that there may be reasonable disagreement with Tully on Locke's attitude toward this and related subjects—a disagreement that would spring from a view that Locke wrote very cautiously. *See L. STRAUSS, supra*, at 246-48. A middle ground in all this is struck by Laslett, *supra*, at 118-20 (Locke's theory of property favored the "haves"; although neither capitalist nor socialist, his view of property "lack[ed] the humanity and sense of social cooperation to be found in the canonists who had preceded him").

<sup>31</sup> *Second Treatise*, *supra* note 30, §§ 25-26, at 327-28.

<sup>32</sup> Stick, *supra* note 1, at 390.

<sup>33</sup> *Second Treatise*, *supra* note 30, § 33, at 333.

<sup>34</sup> Stick, *supra* note 1, at 392-93. Stick's authorities point out that Locke spoke explicitly of *land* that should be left over for later takers, and this would suggest that compensation from other sources was inappropriate. *See J. TULLY, supra* note 30, at 149, *cited in* Stick, *supra* note 1, at 390 n.140. But as Geoff Miller points out, Locke was much less explicit in many other passages, leaving open the possibility that he intended that something "as good" as land, though not land itself be left. Miller, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401, 405 (1987). In any event, contemporary land law might suggest that the reference to land itself was a hint that "enough, and as good" be taken as a metaphor for compensation in some other goods; land was thought to be unique, and *any* appropriation of it could not possibly leave behind something "as good."

Geoff Miller's article, which I was fortunate to see in draft, has now appeared in a symposium issue sponsored by the Institute for Humane Studies, beginning at 10 HARV. J.L. & PUB. POL'Y 273 (1987). The issue contains several other articles bearing on Locke and ethical issues of wealth distribution, and while the printing deadlines keep me from dealing with these in detail, I would like to call the reader's attention to this very interesting set of contributions to the literature.

being unable to appropriate "enough, and as good" things because of prior appropriation by others.<sup>35</sup>

But giving them a bundle is not the only answer in town. For one thing, Locke himself suggests that human beings apparently *consented* to the unequal division of things when they consented to a money economy.<sup>36</sup> And, Stick and his authorities to the contrary notwithstanding, Locke makes it very clear that a money-using economic order (and its concomitant unequal division) preceded civil society, so that consent to money and unequal possessions should not be considered simply a matter of positive law.<sup>37</sup> That, however, only pushes the argument one step back: Why would they consent? Surely they would have demanded or deserved something in exchange. Thus, a consent theory too raises the issue of what compensation would be adequate—not only for the people around at the time of the initial appropriation, but also for all future latecomers, who certainly didn't consent in any explicit way.

Let us think, then, about the range of possibilities for proper compensation for the latecomers and other nonappropriators. We need to start with a prior question: When does appropriation from a commons get to be a problem? At what point are nonappropriators or latecomers

<sup>35</sup> Stick, *supra* note 1, at 402-06.

<sup>36</sup> Men have agreed to disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the byproduct of, by receiving in exchange for the overplus, Gold and Silver, which may be hoarded up without injury to any one. . . . *Second Treatise*, *supra* note 30, § 50, at 344.

<sup>37</sup> For Stick's identification of property with civil government, see Stick, *supra* note 1, at 390 n.140. But Locke added to the passage cited in note 36, *supra*, "This partage of things, in an inequality of private possessions, men have made practicable *out of the bounds of Societie, and without compact*, only by putting a value on gold and silver and tacitly agreeing in the use of Money." *Id.* § 50, at 344 (emphasis added). In the next sentence in the paragraph, Locke distinguishes the positive law of property that accompanies government. Laslett notes that Locke apparently rewrote this paragraph numerous times. *See id.* (editor's note). Tully, interpreting a different version of this paragraph, argues that the close juxtaposition of a reference to civil government showed Locke's preference for governmental authority over property. J. TULLY, *supra* note 30, at 151. This, however, does not really contradict the point that trade and commerce are not themselves necessarily products of positive law. Locke, for example, apparently thought that the state of nature included sale of labor services. *See Second Treatise*, *supra* note 30, § 28, at 329 (referring to original appropriation by servant); *id.* §§ 85-86, at 365-66 (considering domestic service prior to development of political society).

Lest it seem odd that there be something like a trading regime prior to legal enforcement of contracts, we should remember that self-help was the rule in Locke's state of nature. Self-help does not necessarily mean something so crude as bopping another over the head; it can mean instead the "punishment" of halting trade relations with defectors. Modern game theory suggests that government is not necessary for the enforcement of ongoing trading relations: a game of "tit for tat" will do. *See R. AXELROD, THE EVOLUTION OF COOPERATION* (1984). Indeed, some contract theorists view legal enforcement as largely peripheral to the conduct of modern commercial relations. *See* Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC. REV. 507, 509-10 (1977). On the priority of commerce in Locke's civil society, see generally Miller, *supra* note 34, at 404-05 (Lockean theory seems to contemplate trading, money economy during transition stage that preceded civil society).

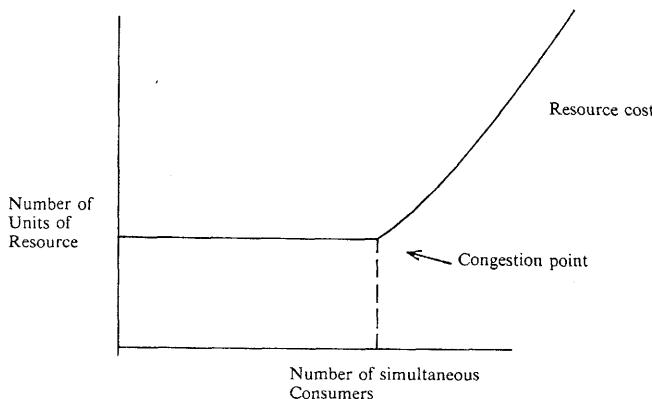
damaged by earlier appropriation? To be sure, *any* appropriation diminishes to some tiny degree the amount of a resource that is available to others. But up to some point, it just doesn't matter—no one is damaged in any way that she or anyone else can perceive or care about. This early state I will refer to as "plenitude." I see that Stick has cited me on the point,<sup>38</sup> and since I don't agree with all the things I think he is attributing to me, I should try to get the record straight. I do not see plenitude as a state prior to property, if property means exclusive appropriation; Locke gives examples of appropriation in the state of plenitude, such as eating acorns.<sup>39</sup> Rather, plenitude is the state in which there is no perceived scarcity, and in which, as a consequence, one person's appropriation does not really matter to anyone else.

At some point, however, the appropriation of resources from a common pool will begin to matter. If appropriation goes on long enough and if the pool is not replenished, the diminution of opportunities for others becomes important or perceptible to them. It is at this point that resources become scarce, and it is at this point that further appropriation has a cost, and indeed, ever-increasing costs. It is also at this point, when we are competing for resources, that a property regime begins to matter, as a way for deciding who has what. Some economists call this a point of "congestion."<sup>40</sup> By this they mean the point at which any more consumption of a resource means that people must compete for it. Beyond that point, the greater the consumption, the higher the competition for—and perceived value of—the resource. The congestion point is thus the

<sup>38</sup> Stick, *supra* note 1, at 408-09.

<sup>39</sup> See *Second Treatise*, *supra* note 30, § 28, at 329.

<sup>40</sup> Barnes, *Enforcing Property Rights: Extending Property Rights Theory to Congestible and Environmental Goods*, 10 B.C. ENVT'L AFF. L. REV. 583, 592-93 (1982-1983). The following is a slight modification of Barnes' graphic representation:



point beyond which "enough, and as good" is not left for others. Stick seems to think that there is not "enough, and as good" only when the *last* item of the resource is taken,<sup>41</sup> but clearly this point of damage to others comes much earlier—for example, when enough berries are taken that latecomers must plod an extra mile instead of a few feet, or when the appropriation of fertile bottomland leaves latecomers only with less fertile plots to work.

This issue is important because it bears on the central issue of the "baseline" for compensation.<sup>42</sup> Stick tells us that the baseline should be the position that latecomers would be in, had others' appropriations still left them "enough, and as good."<sup>43</sup> On that definition, the baseline should be the congestion point—that is to say, precisely the point at which resources begin to pass from plenitude to scarcity, and at which appropriation imposes a cost upon others. It is there that appropriation no longer leaves "enough, and as good," and it is also there that property and contract regimes begin to matter, among other things, as a means for coping with conflict over scarce resources.<sup>44</sup>

Now, on that view, what exactly have latecomers lost by not having "enough, and as good" of the common resources that were once at everyone's disposal? In short, what have they lost by the appropriation of resources, an appropriation that accompanied the development of a regime of private property and trade? Stick seems to think that latecomers should get some portion of the *present* value of those appropriated resources, since the latecomers have lost an opportunity roughly comparable to that enjoyed by the current owners.<sup>45</sup> I think this is wrong, particularly when one realizes that the congestion point is the baseline of what is lost.

A different answer would focus on the kind of life that one could live prior to the congestion point, a lifestyle in which one could appropriate things at will—that is, life in a condition of plenitude, before appropriation really matters very much. What kind of existence is that? Well, it seems at first blush that one might do quite well indeed in a condition of plenitude. If I could still appropriate the fertile bottomland, I could make it blossom with all kinds of products. Let us say that I choose to grow corn. I could grow 100 bushels. I would be rich, right?

But wait—why would I bother to plant so much? Let us suppose

<sup>41</sup> See Stick, *supra* note 1, at 390-91, 402 (reference to obligation to compensate beginning when "last" item is appropriated, though duty to compensate "zips back" to earlier appropriators). Stick seems to recognize the earlier point of congestion in a later passage. *See id.* at 402.

<sup>42</sup> For the "baseline" term, see R. NOZICK, *supra* note 3, at 177; *see also* Stick, *supra* note 1, at 397.

<sup>43</sup> Stick, *supra* note 1, at 402.

<sup>44</sup> See, e.g., Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347-57 (1967); Yandle, *Resource Economics: A Property Rights Perspective*, 5 J. ENERGY L. & POL'Y 1, 8-14 (1983) (development of property entitlements from commons).

<sup>45</sup> Stick, *supra* note 1, at 397, 402-06.

that I only eat ten bushels of corn a year. Why should I grow more? The answer is that unless I can trade the extra corn for something else I want, I won't grow it. And since we are in a state of plenitude, I can't trade my corn because no one will give me anything for it—it is too easy for everyone else to eat berries instead. Note that this condition also means that the land has no value to speak of, since land (like any other productive input) is generally valuable only because someone will pay something for the outputs to which it contributes.

In a condition of plenitude, then, the baseline is quite primitive: there is no trade, and the value of whatever I appropriate, prior to the congestion point, is only whatever my labor can make of resources that no one wants.

Enter trade and commerce and the division of labor that Adam Smith tells us makes all the difference.<sup>46</sup> What happens now when I grow the 100 bushels? Now I can trade them for shoes from the shoemaker, for fudge from the chocolatier, and so on—or I can trade for money (or some medium of exchange) and buy something with the money that I get from my customers other than fudge and shoes. Why do the shoemaker and chocolatier have money to give me for my corn? The answer has to do with property again. It started when the shoemaker and chocolatier got property rights in leather and in raw chocolate. They worked their materials over and made them more valuable—and they did so because they knew that they could trade their finished goods, reap the profits, and buy my corn as well as other things.

Note the effect of all this on the land that I have appropriated: it is now much more valuable, because the products that I raise can be traded. As Locke noted about land in the middle of North America, no one would have bothered to appropriate it had it not been for the possibility of trade in its products.<sup>47</sup> With a system of trade and commerce, land quickly passes the congestion point and its value rises. More people appropriate land, and as the productive land becomes scarcer, they bid more and more to get it from prior appropriators. Meanwhile, I bid more for seeds, plows, and so on, so that I can invest even more in my property and make it even more productive.<sup>48</sup> In short, with trade and commerce, the resources I appropriate become more valuable because my labor (which I "mix" with resources) is itself more valuable; in turn, my labor is more valuable because a lot of other people are laboring on

<sup>46</sup> A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (E. Cannan ed. 1937).

<sup>47</sup> Second Treatise, *supra* note 30, § 48, at 343.

<sup>48</sup> Stick seems to think that labor on property ends with the initial appropriation; he suggests that only the *first* appropriator creates value in property through labor. See Stick, *supra* note 1, at 390 n.138. Perhaps this is true of consumption goods, but it is not true of goods that are used for production; indeed, the point of having property is to allow one who invests effort to reap the benefits of that effort, and for productive property, this effort can continue indefinitely beyond first appropriation.

their resources and then trading with me and with each other and buying the goods that I raise on my land.

And here is the lesson of all this furious activity: The value of my land—or anything I own—depends on a property *regime* that allows me (and others) to invest labor in resources, and on a commercial *regime* that allows me (and others) to trade the products with anyone who wants them more than we do ourselves. Once all this is possible—that is, once we can safely invest time, effort, and talent in resources—we can make wonderful uses of them. We try harder to get resources, we bid more for them, they become ever more scarce, and we bid even more for them—which is to say, as resources become scarce, they become more valuable, and vice versa.

The system that I have described is a kind of "ideal type" of the classical property regime, and everyone knows that there are lots of glitches.<sup>49</sup> But the ideal type is a useful device to try to sort out the

<sup>49</sup> RUM and her friends would call these "market failures"—transaction costs, strategic behavior, monopolization, and so on. Stick does not address these, and they are on the whole not important to his argument, with the exception of his short commentary on Nozick's remarks on monopoly. As to that portion of the paper, Stick's discussion of monopoly is difficult to follow, but to put the best face on it, it seems wildly idiosyncratic. He appears to equate something akin to monopoly prices with full appropriation of property, no matter by whom. See *id.* at 396-97 (full appropriation equated with concentration of ownership, efficient market equated with unappropriated resources). The usual view, however, is that if there are many owners (who can sell) and many potential buyers to bid against each other, monopoly in a resource is extremely difficult to establish and equally difficult to maintain—whether or not the resource is fully appropriated. The reason is this: As soon as any individual begins to acquire even partial monopoly control over a given product, other bidders are attracted to the product by the prospect of its rising price. But in order to get a cut of these profits, they sell what they have acquired, thus effectively increasing the supply and lowering the price to a competitive level. See R. POSNER, ECONOMIC ANALYSIS OF LAW 261-62 (3d ed. 1986) (monopoly prices attract new entrants); see also Buchanan, *supra* note 25, at 6 (economic rent of initial entrepreneurial monopoly attracts new entrants to field). Just in case Stick thinks that monopoly purchase of all the world's drinkable water (the example cited from R. NOZICK, *supra* note 3, at 179, see Stick, *supra* note 1 at 396) could be concealed easily from other bidders, I suggest that he consider the difficulty that the First National City Bank of New York had in concealing its acquisition of one city block in New York. See Hellman, *How They Assembled the Most Expensive Block in New York's History*, NEW YORK, Feb. 25, 1974, at 31, reprinted in R. ELICKSON & A. TARLOCK, LAND-USE CONTROLS 1014 (1981).

On discussing cartels, Stick also glides past the problem described in the term "prisoners' dilemma"—the systematic incentive of individual actors to cheat or "defect" even though cooperating as a group would bring the greatest collective reward. See Stick, *supra* note 1, at 396-97. One reason why cartels tend to fall apart is because the prisoners' dilemma leads cartel members to cheat on each other (defect) and to cut prices in hopes of attracting a larger share of the market. This is an instance in which the prisoners' dilemma benefits the public, even though it often impedes public benefits that require cooperation. Ultimately, of course, the cartel members' cheating redounds to the public in the form of restored competitive prices. See Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies*, 4 RES. L. & ECON. 1, 17 (1982) (discussing prisoners' dilemma generally and noting its application to cartels). For further comments on the "prisoners' dilemma," see *infra* text accompanying note 80. Stick also seems to think that compensation is due even when prices are competitive. See Stick, *supra* note 1, at 397. Whatever the rationale for this position, it cannot be "market failure."

compensation question. Assuming that this ideal type exists, what has the latecomer lost because others have appropriated beyond the congestion point?

One answer is that the latecomer has lost nothing and should get nothing at all. Once again consider land as the resource in question (though any other resource would do). Prior to the congestion point, land had no value; it was not a scarce good, and only scarce goods have value. Since no one puts a value on things that are free for the taking, the latecomer has lost nothing.

Now this answer seems incomplete, and I think Stick is correct to point out the latecomer's lost opportunities. A second answer is the answer I prefer, at least tentatively: the latecomer lost the chance to live life in a condition of plenitude. Now this is a pretty primitive life, since plenitude is a precommercial state. As Locke said, "in the beginning all the World was *America*"—and by that he meant a pretty savage and unproductive place.<sup>50</sup> But it is still something—indeed some might find it preferable to the hustle and bustle of a life full of goods<sup>51</sup>—and a regime of property and commerce do spell the end for plenitude, at least in some resources.

But there is a built-in compensation, and it is one that Stick does not seem to notice. In a Lockean world, latecomers still own the most important resource of all, their own labor,<sup>52</sup> and the very property/trading regime that goes hand in glove with the appropriation of other resources also makes everyone's labor more valuable.<sup>53</sup> On this view, then, the latecomers also would deserve no compensation—not because they lost nothing, but because they have already been implicitly compensated through the greater value of their labor.

But suppose, for the moment, that this compensation is not enough to make up for what was lost by appropriation beyond the congestion

<sup>50</sup> *Second Treatise*, *supra* note 30, § 49, at 343; see also *id.* § 37, at 335-36 (describing the "wild woods and uncultivated wast[e] of America left to Nature," with its "needy and wretched inhabitants").

<sup>51</sup> M. SAHLINS, STONE AGE ECONOMICS 2-4 (1972) (describing hunter-gatherer societies as "the original affluent society" despite their poverty, unappreciated because of neolithic or bourgeois prejudices against their undemanding lifestyle).

<sup>52</sup> Locke considered slavery a very special case, distinguishable from the condition of a servant who sells labor services; the slave was one whose life was forfeit and could be taken at any time. See *Second Treatise*, *supra* note 30, §§ 23-24, at 325. This suggests the paramount importance that Locke saw in ownership of one's own labor (and its products): without ownership of one's labor and its products, one cannot sustain life itself.

<sup>53</sup> *Id.* § 48, at 343 (possibility of trade makes products of labor valuable); cf. Bogart, *Lockean Provisos and State of Nature Theories*, 95 ETHICS 828, 833-34 (1985). Bogart argues that a property regime is exploitative, because latecomers lack the opportunity to make acquisitions and are forced to work for the benefit of others. *Id.* at 833-34. This entirely overlooks, however, the point that a property regime enhances the value of labor, which everyone continues to own. Indeed, a property regime makes possible a labor shortage scenario, in which entrepreneurs bid up labor so high that laborers may capture the "rents" of the enterprise.

point of resources. Is there some other principle of compensation? A third answer is the one that Stick gives: the proper compensation is some portion of the *present* value of resources. But the difficulty with this answer should by now be obvious. The value of those resources—for example, my farm—is a value far beyond the congestion point and the loss of plenitude, since it reflects not only my investment of labor in the farm, but also the investment of many other persons (who trade with me) in *their* property. The more I invest in the productivity of my farm, the more corn I will have and the more I can bid for shoes when I trade for them. The more the shoemaker invests in making his shoe factory productive, the more shoes he can offer and the more he can bid for chocolate. The more the chocolatier invests in making his product tasty and saleable, the more he can bid for my farm products, and so on. It is our investment in our respective enterprises, and our ability to trade, that enhances the value of all our resources.

Stick says that we producers should share these gains from trade with everyone else, because they (or what he calls "general economic development") are a "public good."<sup>54</sup> But what makes them a public good? An alternative way to see these gains from trade is that they are a good that is indeed "common," but common in the sense of a partnership rather than a public good; they are the common property of *producers and traders* and are shared only by those of us whose investment in our respective resources makes all of our resources more valuable. Latecomers, one might well think, have had nothing to do with this enhanced value of resources, which is due to investment and trade. To give the latecomer a share of resources at their *present* value is to let latecomers take what was produced by the labor and trade of others.<sup>55</sup>

Stick's "public good" counterargument is unpersuasive, crucial though it is to his argument for sharing, because he overlooks the origin of economic development. First, Stick says that economic development comes from many people's contributions, past and present.<sup>56</sup> But RUM says, if that is the case, economic development should be the joint property of those who have contributed,<sup>57</sup> and RUM supposes that in order to

<sup>54</sup> Stick, *supra* note 1, at 411-12.

<sup>55</sup> The weakest link in all this is sometimes thought to be the counterexample of the "speculator," who purportedly makes no investment of labor in his property; he thus seems to share in the common pool of gains from trade without doing anything to deserve it. But it is at least arguable that the speculator provides a "product": he has invested (in ways that others have not) in getting information about the future price of resources, and he ultimately gives information to the market about the level of supply and demand. R. POSNER, *supra* note 49, at 42. See generally Kirzner, *Entrepreneurship, Entitlement and Economic Justice*, in READING NOZICK 383 (J. Paul ed. 1981).

<sup>56</sup> Stick, *supra* note 1, at 411-12.

<sup>57</sup> Stick suggests that this view depends on a labor theory of value, but some of his comments are not very helpful. See Stick, *supra* note 1, at 412. For example, his comment about Nozick's "contempt" for the labor theory seems to me to be a pejorative, but not an argument. See *id.* In any event, even if it is true that value is based on demand, one need not have a labor theory to think that

encourage the contributors to contribute even more, we will have to include their heirs, donees, and assigns—that is, the people to whom the contributors have transferred their goods voluntarily.<sup>58</sup> Second, Stick says that value is a product of social institutions, such as a property regime.<sup>59</sup> RUM says that is true, but social institutions only produce valuable things insofar as they give people an incentive to produce and invest in things that people value—and requiring the producers to share the gains from trade is going to cut their incentives to produce the things that other people want.

I will return to the notion of a property regime as a kind of social property,<sup>60</sup> because I think that it has other ramifications that Stick does not explore. But for the moment, we can continue to assume that latecomers have not yet made any investment of time and effort and do not deserve to share even in the "partnership assets"—the gains from trade—except insofar as they do make such investments. And note that they *can* make such investments if they wish: they still own their labor, which has become a more valuable commodity precisely because others have property. Their labor is worth more because a property regime encourages the farmer and the shoemaker and the chocolatier to invest in more labor—including hiring labor, and in the process, bidding up its price—to make their respective enterprises more productive. The more they invest in labor, the more the laborer can demand for his services, and the more likely it is that he will join the proprietary class himself—

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persons who contribute to the satisfaction of demand should be encouraged to contribute more. One way to do so is to accord them the benefit of gains from trade. Note once again that one uncaptured value of the contributors' activity redounds to the benefit of all: everyone's labor becomes more valuable.

<sup>58</sup> Locke thought that inheritance was natural, and J. TULLY, *supra* note 30, at 133-34, suggests that he might have thought that heirs actually made a contribution to a kinship group's property. RUM doesn't think the heirs and donees are necessarily deserving in their own right, but she is not really thinking about them at all. She would protect gifts to them only because the original donor wanted to make this use of his/her property, and RUM thinks that if such gifts are disallowed, the original donor might suffer Benthamite discouragement, become correspondingly less productive, and in general contribute less to the total wealth.

<sup>59</sup> Stick, *supra* note 1, at 412. He waffles on the social character of a property regime, however. See Stick, *supra* note 1, at 404 n.186. He seems to think that the institution of private property can be abstracted out from other elements that contribute to economic development, and suggests that gains deriving from the private property regime itself need not be part of the "baseline" for calculating compensation. This would suggest that a private property regime is NOT a public or social good, at least for the compensation purposes that Stick wants to support.

Stick may be distinguishing a private property regime from a communal property regime, and using the economic development of the latter as a baseline for compensation: that's supposed to be what latecomers would have had if things hadn't been appropriated. But RUM would disagree, and would remind Stick of the point that he makes in his note 205, that even a communal property system involves appropriation from the commons, and thus "privatizes" resources in the community vis-à-vis the rest of the world. In this sense, every property regime is "private." RUM would say, of course, if one abstracts out a property regime, there is precious little economic development, and not much left from which to compensate anybody.

<sup>60</sup> See *infra* notes 77-88 and accompanying text.

with, shall we say, fairly predictable effects on his attitudes toward redistribution.

Thus if Stick's argument is that latecomers "deserve" compensation,<sup>61</sup> one response is that a property regime already compensates by increasing the value of labor. But our practical critic, RUM, is not engaged in that argument. RUM doesn't really care who deserves what; she is simply concerned that if the gains of trade are distributed to those who have made no investment, we will kill the goose that laid the golden egg. From her point of view, it is better to give the gains to those who invest time, effort, and talent in resource development and trade, so that they will continue to invest and trade and generally increase the stock of things people want. Once again, the pie will be bigger, and even the landless person, who hires out his labor, will be able to demand more for that labor.

### III. AN EXCURSION TO A DESERT ISLAND

Stick also uses a well-known metaphor to argue that newcomers should get a share of resources in their present state. He uses the desert island example,<sup>62</sup> so I guess that I will have to use it as well, although I think that his version of the story is awfully peculiar. Even under the best of circumstances, a desert island is a pretty thin example of a property regime, and because of that, the example exaggerates a number of points.<sup>63</sup> My story will have to exaggerate them as well, but I hope the reader will bear in mind that this wasn't my idea to begin with.

In Stick's story, the island has six coconut trees producing a total of six daily coconuts, and, initially, two persons, who decide to divide up the trees into individualized property. One of them, *A*, does a good job tree-tending, and gets a lot of coconuts from his trees (fifteen per day); *B* is less skilled, and gets only nine per day. Enter *C*, the latecomer. What, if anything, should *C* get? Stick argues that *C* should get a share of the total proceeds of the trees' production, because *C* might help to make at least some of the trees more productive: all three persons together can produce a total of thirty instead of twenty-four coconuts, all from the same stock of six trees.<sup>64</sup>

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<sup>61</sup> Stick presumably is talking about "deserving" compensation rather than "entitlement," since he thinks the latter is relative to a social system, and this compensation would collapse where the social system is one of non-compensating private property. On the distinction between "desert" and "entitlement" see Stick, *supra* note 1, at 383; see also *infra* note 76.

<sup>62</sup> Stick, *supra* note 1, at 405-06.

<sup>63</sup> A desert island, of course, might be a much more appropriate metaphor for considering other types of ventures; for example, spiritual development, romance, and perhaps music, all of which Duke Ellington no doubt had in mind when he reportedly stated that if he could take only two things to a desert island, those would be a copy of the Bible and Lena Horne. See Bernstein, *The Life It Brings*, THE NEW YORKER, Jan. 26, 1987, at 35, 48.

<sup>64</sup> Stick suggests a compensation of twelve coconuts for *A*, nine for *B* and nine for *C*. See Stick, *supra* note 1, at 405. This supposes that *A* would give up three coconuts per day and at the same

There are some odd features of this story. For one thing, *A*'s wealth vis-à-vis *B* may be violating the difference principle, in that *A* gets richer and expands the gap between himself and *B*, without *B* getting any better off. Moreover, *A* is able to do so by the investment of an unearned asset—his green thumb.<sup>65</sup> And unless there is some ground for distinction, the difference principle, strictly applied, might require *A* to pay off *B* when *A* invests his talent in such a way as to leave *B* behind.<sup>66</sup>

Leaving these conventional quibbles to one side, there are other oddities. For one thing, the extremely limited opportunities for division of labor, trade, and commerce vitiate the reasons for a property regime: this is not a context in which an individualized property regime would take anyone very far.<sup>67</sup> For another thing, if *A* really does have so green a thumb, it is not clear why *A* and *B* split up the management of the trees in the first place. They might have been better off to work the trees jointly, with *A* supervising *B* (and taking an agreed-upon differential in coconuts). One would think that, at the very least, *B* would be smart enough to pay *A* a few coconuts for *A*'s advice.<sup>68</sup> But even if *A* and *B* decided to manage the trees jointly, there is no reason to expect that they would welcome *C* to their little joint property, since managed communal

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time supervise the activities of *B* and *C*. RUM has her doubts about whether *A* can be induced to do this, unless supervising is a sufficiently attractive activity to *A*.

<sup>65</sup> I am presuming here that talent is unearned, since that is what Rawls says. See J. RAWLS, *supra* note 2, at 74, 100-01. But, as Stick notes, *supra* note 1, at 384, talent might be—and perhaps often is—a learned faculty, particularly a talent for something like gardening. Looked at in this way, talent would be the result once again of investment. That, however, would not save it from redistribution under the difference principle. Stick's observation, that one only has to share one's talents when one actually uses them, hardly seems a very jolly invitation to investing in and developing one's talent. See Stick, *supra* note 1, 385 n.121.

<sup>66</sup> Compare this approach with James Madison's suggestion that "the first object of government" is to protect the "diversity in the faculties of men, from which the rights of property originate." THE FEDERALIST No. 10, at 42 (J. Madison) (C.H. Wilson & R.B. McCallum eds. 1948). RUM would point out that the purpose of protecting "diversity of faculties" is to encourage those who are most likely to make valuable investments and make property itself more valuable.

<sup>67</sup> It is not really clear what is going on in *A*'s and *B*'s differential production of coconuts. If *B*'s nine coconuts per day are enough to live on, one has to wonder why *A* bothers to grow fifteen; six extras are worthless. If on the other hand *B*'s nine coconuts per day are not enough to live on, *B* is going to be tempted to try to break up the system, and either snitch some of *A*'s coconuts (that is, break the property code) or ask *A* to supervise *B* in *B*'s production. This would of course be a primitive division of labor, and would make the property regime more sensible. But it still would not take anyone very far down the road to the classical capitalist utopia of wealth based on a multifaceted market.

<sup>68</sup> See *supra* note 67. It is also possible that there might be some economies of scale in this enterprise, and consequently it would be even more sensible for *A* and *B* to manage the trees jointly. Perhaps, for example, by standing on each other's shoulders they could trim the trees and make them more productive in ways that would not be available to *A* or *B* acting individually. One might note that regimes of common agricultural property in European history took place precisely where there were economies of scale in resource use, such as in livestock management. See C. DAHLMAN, THE OPEN FIELD SYSTEM AND BEYOND: A PROPERTY RIGHTS ANALYSIS OF AN ECONOMIC INSTITUTION 7-8, 27, 112-14 (1980).

property is not the same as a commons open to all the world. Vis-à-vis the outside world, communally held property is still the property of those who are members of the community and who have their own internal rules for distribution of its product.<sup>69</sup>

Nevertheless, *C*'s presence does add something to the cultivation practices of *A* and *B*, so that the six trees, taken together, are more fruitful than they were before—they can yield thirty coconuts instead of twenty-four. Under these circumstances, it is perfectly just, as a matter of desert, to give *C* a share of the enhanced whole: since *C*'s presence (or investment of labor) increases the total amount available for all, he ought to get a share of the proceeds commensurate to what he adds.

Some of this makes perfect sense, even to RUM. If *C*'s presence enhances coconut production, RUM thinks that *C* ought to get a reward comparable to what he adds, so as to encourage him (of course) to wreck his ship at places where additional labor is valuable—though she would prefer that he wreck somewhere where his labor brought real economies of scale and would more than counterbalance his additional consumption; she would reward him even more for *that* shipwreck.<sup>70</sup> Thus, unlike Stick, who suggests giving *C* the same number of coconuts that he gives *B* (nine apiece, with *A*'s share reduced to twelve), RUM would give *C* six coconuts (the marginal amount added by his labor), which might be enough to live on, but which also might be low enough to encourage him to shipwreck elsewhere.

Stick's point seems to be that *C* is doing at least as much work as *B*, and thus, should get at least as much reward.<sup>71</sup> *A* is the one to suffer an income drop, but Stick's rhetorical question seems to be: Why should either *B* or *A* get so disproportionate a reward for something so arbitrary as being there first? RUM has an answer, but it has to do with another lesson from the island, a lesson that goes back to the issue of what *C* has lost by the prior appropriation by others.

Let us take the island example—not in Stick's fairly cheerful hypothetical, but rather in the very bleak light that most people would see it. This is the scene in which *C* arrives in a place where he will consume more than he adds, and his presence will substantially diminish what is left for the original appropriators. Let us even assume the very worst case—that *C*'s additional labor adds nothing at all to the productivity of

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<sup>69</sup> See *id.* at 120 (discussing "stinting" and similar communal controls on individual use of jointly owned common areas).

<sup>70</sup> To be sure, it is silly to say that he chooses the place to shipwreck, but then, the desert island is a pretty silly metaphor for the characteristics of a property regime. By so severely constricting the opportunities for the application of useful labor, the metaphor assumes away the most important "compensation" that a property regime can make to latecomers: this regime enhances the value of their labor.

<sup>71</sup> This looks like a version of a compensation scheme based on average rather than marginal contribution, at least as between *B* and *C*, though Stick would give something extra to *A* to account for *A*'s greater talent. See Stick, *supra* note 1, at 405-06.

the trees. How do we figure the baseline for his compensation? It is far too late for plenitude, which we can only approach by wishing away (or killing off) *A* and/or *B*.<sup>72</sup> Moreover, there can be no "compensation" through the enhanced value of *C*'s labor, since there are no opportunities for further investment of labor or trade, and the incremental value of *C*'s labor is zero. What then should *C* get, if anything? What compensation should *A* and *B* give *C* for the fact that they have already appropriated all the relevant resources?

At Stick's starting point, we must compare *C*'s situation to a situation in which no resources had been appropriated. What would the island look like if *C* were to arrive and no resources had become the property of anyone? That would be the condition which economists sometimes refer to as the "tragedy of the commons":<sup>73</sup> a condition in which a resource has become scarce, but in which no property regime mediates its use. On our island, there would be nothing to channel the resource toward those who most value it or to encourage either *A* or *B*, individually or jointly, to protect or invest in the resource. Instead, the overwhelming incentive would be to grab the most first, often until the resource is exhausted.

So, on our island, the baseline is the situation in which neither *A* nor *B* has property rights in any of the trees or their proceeds, the coconuts. Since they have not come to an agreement about cultivation and entitlements (which is to say, they have not treated the trees as property, either individual or joint),<sup>74</sup> both just grab whatever coconuts are around. What is worse, neither *B* nor the industrious *A* has much incentive to try to make the trees more productive, since even if *A* worked hard, *B* could take the proceeds (*A* having no property right in them) and get a "free ride." By the same token, neither *A* nor *B* bothers to plant new trees or tend to the old; they may even strip the trees and make them less productive, as each tries to get the most coconuts before the other does. Thus, when *C* arrives, *A* and *B* are just grabbing coconuts as they fall, and if

<sup>72</sup> One should note that groups who live more or less in a state of plenitude—and who apparently prefer that state to a commercial state where resource use is enhanced through investment and trade—may well control their numbers in order to preserve the state of plenitude. Arthur McEvoy has argued that the California Indian tribes practiced population control in order to prevent undue pressure on resources. See A. McEVY, THE FISHERMAN'S PROBLEM: ECOLOGY AND THE LAW IN THE CALIFORNIA FISHERIES 29-30 (1986). In some ways, this is roughly the equivalent of saying that, if the island will support *A* and *B* but not *C*, the way to preserve plenitude is for *A* and *B* not to allow *C* to come ashore at all, or, alternatively, for *C* to gang up with *B* (or *A*) to get rid of *A* (or *B*). Morally, of course, there are substantial differences; a practice of population control takes place over a longer period of time and may not affect living individuals. Locke's mode of preserving plenitude was the prohibition against waste, see *Second Treatise*, *supra* note 30, § 31, at 332, but that would not help much on a grim version of the desert island, where inhabitants face starvation.

<sup>73</sup> The original name comes from Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

<sup>74</sup> Property need not be individualized. As Stick quite rightly notes, property that is in common ownership is still exclusive property in that it excludes outsiders. Stick, *supra* note 1, at 413 n.205.

they are lucky and have not damaged the trees, they still have six trees and six coconuts per day, instead of the twenty-four that they would have had if they had created property rights in the trees. Things will only get worse when *C* arrives. *C* grabs things too, just like *A* and *B*, and the three of them waste time bickering (or worse, trying to kill each other) over who gets the paltry natural produce of the trees.

And so, what has *C* lost due to the prior appropriation of the trees by *A* and *B*? *C* has lost the opportunity to fight over a considerably smaller number of coconuts. And how does this situation compare to that in which *A* and *B* have appropriated the trees? Well, perhaps the second situation, that of *A*'s and *B*'s appropriation, isn't very good for *C*, though one might suspect that *A* and *B* are more likely to be generous with the twenty-four coconuts that they have under a property regime than with the six that they have in the tragedy of the commons. Why don't we just ask *C*? If *C* is like RUM, and especially if *C* is behind the "veil of ignorance" and doesn't know whether he will be one of the originals or a latecomer, *C* is going to prefer some kind of three-way chance at a total of twenty-four coconuts to the same chance at six.

To return to the question, what is the value of "firstness"? Here is RUM's answer: We reward firstness because the first appropriator helps to get a property regime going. RUM thinks that a property regime yields more total wealth, which she wants, but she sees that we need something to get it underway. The obvious way to do so is by rewarding those who first appropriate things from the commons and bring those unmanaged and otherwise wasted resources into a system where they will be husbanded and protected—or traded to those who can use them best.<sup>75</sup> Thus, there is a version of an argument from desert—relative to RUM's preference about social ordering—in saying that there should be a reward to the first appropriators, and, I suppose, in saying that they should be able to pass on that reward as they choose—for example, to donees and heirs. They deserve the reward because they do a public service by starting a property system that encourages investment and care in the use of resources.<sup>76</sup> From RUM's perspective, all this is desirable be-

<sup>75</sup> If we were to reward some other position in the order of appropriation, such as secondness, fewer people would bother to be first; with the exception of altruists, everyone would jockey to be second, with the result that the commons would stay common.

<sup>76</sup> RUM is aware that Stick makes a distinction between "desert" and "entitlement," see Stick, *supra* note 1, at 383, but she thinks that the distinction is rather odd. As she understands Stick, he thinks that "entitlement" is relative to a system of social ordering. For example, while Wilt Chamberlain is entitled to two points if he makes a basket, RUM doesn't know what it would mean to say that he "deserved" two points on some other ground *not* relative to the social system of basketball (for example, because he is a good player generally or because he is tall). RUM is something of a positivist and thinks, at least tentatively, that "desert" doesn't mean much of anything in the absence of a social system or "game." Thus, she thinks that there is a good reason why, in ordinary language, people often tend to conflate desert with entitlement; when people say that someone has an entitlement that he does not "deserve," they usually mean that there was something fluky about the

cause it brings about the largest available pie. But again, RUM doesn't really care very much about who deserves what in the abstract; what she cares about is incentives. In her view, rewarding the first appropriator creates the right incentives, whatever the argument about desert.

What is left of the argument that appropriators should share with the nonappropriators? I think there may be another approach altogether, and it derives from a point that Stick touches on but does not elaborate. Stick says that general economic development is a "public good."<sup>77</sup> As I have suggested, I think that he does not really defend the position. But there is another "public good" lurking in here that Stick does mention, though with not nearly enough emphasis. This public good is the property regime itself.<sup>78</sup>

I have argued elsewhere that, aside from the most primitive physical consumption (for example, acorn eating), "appropriation" has no content without the understanding and recognition of a community; beyond immediate consumption, the acts of "appropriation" are signalling devices, and signals make no sense in the absence of a recognizing community.<sup>79</sup> Thus, in some ways, it is the community of recognizers that gives content to "appropriation," and thus the community's recognition of something as "property" is an essential element of the property regime that is supposed to make us all better off. It is in this sense that property is a "public good," or perhaps more accurately a "common good," since the property regime "belongs" in common to the community that follows its precepts.

But a property regime, even though it expands the collective pie, in some ways runs counter to the interest of each individual. In a sense, a regime of property is a gigantic communal agreement not to succumb to the "prisoners' dilemma"—the dilemma of a "game" in which we are collectively better off by cooperation, but individually better off by "defection."<sup>80</sup> The participants in a property regime, in effect, decline to "defect" and instead cooperate to become better off collectively. But this is a mutual forbearance against any given individual's interest. We are all too familiar with the temptations to "defect"—with the impulses to acquire through force or deceit the things that, under a property system, we should only acquire through the consent of the recognized owner. Cheaters hope that the rest of us will continue to respect the property that they acquire through cheating, so that we "cooperate" while they

preconditions to the entitlement (for example, Wilt Chamberlain doesn't "deserve" two points for making a particular basket, because he threw the ball backwards over his head in a gesture of annoyance). For a related discussion of the collapse of meaning of "desert" in Rawls' *A Theory of Justice*, see M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 82-95 (1982).

<sup>77</sup> See *supra* text accompanying notes 54-57.

<sup>78</sup> For Stick's ambivalence on a property regime as a public good, see *supra* note 59.

<sup>79</sup> Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 82-83 (1985).

<sup>80</sup> For a discussion of the prisoners' dilemma, see *supra* note 49; see also R. HARDIN, COLLEC-

"defect."<sup>81</sup> The more despairing, especially among those with little, might even think that their interests are better served by the rule of the stronger, where everyone "defects" and the property regime effectively collapses into the war of all against all.<sup>82</sup>

To be sure, political authority protects the property regime against defection—and John Locke tells us that that is the main function of political society.<sup>83</sup> Ongoing relationships also protect against defection, through the threat of retaliation—tit for tat<sup>84</sup>—that can be applied on a great variety of fronts.<sup>85</sup> But our everyday lives are filled with instances that call on us to respect property, even when no public policemen or private retaliation can restrain us: we don't steal the unlocked and unguarded bicycle, we don't pocket the bubble gum when no one is looking, we live up to our side of a deal, even with a stranger who would have no easy way to enforce a bargain. A property regime, in short, depends on a web of respect, honor, and acceptance that somehow modifies the immediate appetite for "more."

Considerations of this sort give RUM pause. She knows that some eighteenth-century thinkers thought that commerce itself—"le doux commerce"—would inculcate habits of sociability that might keep the whole property regime intact, but she doubts that commerce really has

TIVE ACTION 24 (1982). The "prisoners' dilemma" is often represented in matrix form, for example:

		B's choices	
		cooperate	defect
A's choices	cooperate	#1 -1, -1	#2 -20, 0
	defect	#3 0, -20	#4 -10, -10

See Hirschleifer, *supra* note 49, at 14.

The matrix illustrates a situation in which *A* and *B* would be best off collectively when both cooperate (Box 1). However, *A* would be best off individually if *A* cheated or "defected" while *B* cooperated (Box 3), and worst off if *A* cooperated while *B* cheated (Box 2). *B*'s individual choices are a mirror image of *A*'s (best off in Box 2, worst off in Box 3). Thus each player has an individual incentive to cheat and a disincentive to cooperate, even though, taken as a collectivity, *A* and *B* would be best off if both cooperated.

<sup>81</sup> On the matrix in note 80, *supra*, this is represented in Box 2 or 3 (*A* cooperates, *B* defects, or vice versa).

<sup>82</sup> On the matrix in note 80, *supra*, this is represented in Box 4 (everybody defects).

<sup>83</sup> Second Treatise, *supra* note 30, §§ 85-87, at 365-66. However, political organization is also a form of "collective action," which itself presents "prisoners' dilemma" problems. See R. HARDIN, *supra* note 80, at 25-28.

<sup>84</sup> R. AXELROD, *supra* note 37 (threat of retaliation in tit for tat game).

<sup>85</sup> See, e.g., Ellickson, *Of Cows and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 676 (1986) (variety of fronts for "accounting" in neighborhood relations).

this moderating effect on self-interest.<sup>86</sup> She thinks back to the desert island, where the property regime between the well-off *A* and the less-well-off *B* requires *B*'s contribution and acceptance as well as *A*'s, and she asks herself: do the *B*s of the world (not to mention the *C*s) need some extra incentive to induce them to continue their contribution to a property regime, when at the moment they seem to be doing less well than the *A*s? Her first answer might be, "no." She doesn't think that very many *A*s and *B*s and *C*s will be caught on a desert island, where there are very limited possibilities for specialization, division of labor, and commerce; and she thinks the *B*s and *C*s are sufficiently compensated by the possibilities that are presented to them by the expanding pie. But she is not so sure that this is enough to keep them from cheating or otherwise "defecting," satisfying their own immediate self-interest even though this undermines the property regime that benefits everyone. She thinks that perhaps the social system needs to build in some further inducement to good behavior, and she calls this inducement, as economic theorists might, the "Big Bribe."<sup>87</sup>

It is exactly here that RUM's way of thinking is at its most vulnerable, revolving as it does about the size of the pie and inducements based on self-interest. The rhetoric of the Big Bribe says it all. This is the language of payoffs and extortion, and it carries with it an incentive that is extremely dangerous to a property regime: the incentive to threaten further "defections"—further violence and cheating—in the effort to make the Big Bribe even bigger. This is the deepest cleft in RUM's logic. Her scheme to increase the size of the pie requires some non-self-interested moral basis (indeed, some altruistic motive) just to induce the participants to maintain the regime of property that, RUM thinks, makes everyone collectively better off. And her rhetoric does not allow of such motives. But then, neither does Stick's.

#### IV. CONCLUSION

RUM's critique of Stick is that his arguments about Rawls and Nozick are insufficiently attentive to the ways that a property regime makes us all better off, by structuring incentives in such a way that most

<sup>86</sup> See A. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 59-63 (1977) (commerce civilizes participants); see also Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LIT. 1463, 1464-66 (1982). For the application of this kind of thinking in connection with credit and bankruptcy, see Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 16-21 (1986). Alexander Hamilton thought that the "gentle commerce" notion had it backwards: "Has not the spirit of commerce, in many instances, administered new incentives to the appetite . . . ?" THE FEDERALIST No. 6, at 23 (A. Hamilton) (C.H. Wilson & R.B. McCallum eds. 1948). Marx thought the same. See A. HIRSCHMAN, *supra*, at 62.

<sup>87</sup> See, e.g., Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 154 (1977-1978) ("big bribe" as one individualistic-economic rationale for welfare system).

people are likely to work harder than they otherwise would, and thus make resources more valuable for everybody. But RUM herself has a problem, because she can't tell us how we get people to abide by the property regime itself; when their own immediate self-interest tempts them, and when nobody is around to punish them, the rational utility maximizers are going to "defect," even if the property regime itself ultimately collapses. But Stick has this problem too, in addition to the problems that RUM points out: he can't tell us how we get people to cooperate any more than RUM can—and he needs to do so as much as RUM does, because he too needs to locate something that will induce people to contribute in a non-self-interested way in supporting a system of entitlements.

Stick seems to see that a property regime is itself a kind of community property, maintained by the constant cooperative contributions of the whole social organization, not just by those who do relatively well in it,<sup>88</sup> but he neglects this point instead of pursuing it. If there is an argument for sharing gains in a property regime, the starting point has to lie in this common interest in the property regime itself—not in Stick's or anyone else's version of "compensation" for "enough, and as good." This "compensation" is an entitlements-based notion, and it falters on two grounds, quite aside from RUM's critique about incentives. First (just like RUM's property regime), it is a regime of entitlements and as such, it presupposes some modicum of non-self-interested cooperation to support it.<sup>89</sup> Second and much more serious (and again just like RUM), it undermines that cooperation, by reintroducing the self-interested language of "where's mine?" in another form. What is needed is not a rhetoric of entitlement, my rights over against you; what is needed is a rhetoric of cooperation.

Might gains-sharing serve as such a rhetoric? Perhaps, though I have no formula for gains-sharing that might encourage cooperation, and indeed I am not convinced that gains-sharing is necessarily the answer, in any way other than as a kind of rhetoric or exhortation. But I do know what gains-sharing would have to look like if it were envisioned as rhetoric: it can't be phrased as "compensation" or "entitlement" any more than it can be phrased as a "Big Bribe." Instead, it must be a kind of sharing that carries the symbolic freight of fraternity,<sup>90</sup> of community-

<sup>88</sup> It should be noted that even the winners (as well as those less-well-off) might need some inducement to cooperate instead of cheat. In a prisoners' dilemma, those who do well could do even better if they were to cheat while others cooperated.

<sup>89</sup> Even if political institutions enforce entitlements to compensation, political action is itself subject to "prisoners' dilemma" problems. See *supra* note 83.

<sup>90</sup> Rawls speaks of the relationship between the "difference principle" and fraternity in his *Theory of Justice*. See J. RAWLS, *supra* note 2, at 105-06. This strikes me as one of the most interesting aspects of his book, and one that is most instructive to those who, like myself, view a political community as an entity that entails some cooperation going beyond individual insistence on individual rights.

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wide *recognition* of contribution, and of *sympathy* and of *generosity* to all members, rather than of payoffs of individual entitlements as compensation. It must be a rhetoric that says to the common "owners" of the property regime (that is to say, the entire community): we are all responsible to each other if we are going to use this property regime to get a bigger pie, and we must all wish each other well, restrain our individual self-interest, and instead pull together to make it work for all of us.